

Application No. 09/887,528

execute the Declaration.

M.P.E.P. § 409.03(a)(B) requires that the application be accompanied by proof that the nonsigning inventor refuses to execute the application papers. According to M.P.E.P. § 409.03(d), the circumstances of the presentation of the application papers and of the refusal must be specified in a statement of facts by the person to whom the refusal was made, documentary evidence to support the facts, if any, should be submitted, and the nonsigning inventor's reasons, if any, for refusing to sign the Declaration. Furthermore, page 2 of the September 3, 2002 Decision, in recounting the circumstances of Mr. Ekhaus' refusal to execute a Declaration in the above-captioned case, states:

Should Mr. Ekhaus, notwithstanding the extra time that has now elapsed (some 6 additional months) for him to review and understand the instant application papers still decline to execute a declaration in compliance with the statutes and regulations, then the circumstances surrounding any continued refusal to properly "join" in this application should be recounted, and petitioner may then obtain relief under the provisions of 37 CFR 1.47 and U.S.C. § 116. The consequences of acceptance of this application under that regulation and statute as to any nonsigning inventor, as recounted in MPEP 409.03(i) and (j), should be made clear to Mr. Ekhaus.

Accordingly, the undersigned submits a statement of facts describing the presentation of the application papers subsequent to the September 3, 2002 Decision and the refusal to join by joint inventor Michael A. Ekhaus correlated with documentary evidence to support the statement of facts. Furthermore, Applicants submit Declarations signed by the available inventors in accordance with M.P.E.P. § 409.03(a)(A), the last known address for each nonsigning inventor in accordance with M.P.E.P. §§ 409.03(a)(C) and 409.03(e), and Applicants provide authorization to charge the required fee of \$130.00 to our deposit account 06-0916 (pursuant to 37 C.F.R.

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§ 1.17(h)).

**STATEMENT OF FACTS CORRELATED WITH DOCUMENTARY EVIDENCE**

- I. On September 9, 2002, the office of the undersigned received a copy of the September 3, 2002 Decision dismissing the March 18, 2002 petition of the undersigned under 37 CFR 1.47(a) as inappropriate and setting a two-month period to submit a properly executed declaration by joint inventor Ekhaus. (See Exhibit A: copy of the September 3, 2002 Decision.)
- II. The undersigned incorporates by reference the complete statement of facts and Exhibits submitted as part of the undersigned's March 18, 2002 petition under 37 CFR 1.47(a).
- III. On September 25, 2002, the undersigned sent by facsimile to Mr. Schumann, counsel for Mr. Ekhaus, a copy of the Decision, a copy of a Declaration to be executed by Mr. Ekhaus, and a cover letter requesting that Mr. Ekhaus execute the Declaration and including sections 409.03(i) and 409.03(j) of the MPEP. (See Exhibit B: copy of facsimile confirmation receipt and facsimile sent to Mr. Schumann, counsel for Mr. Ekhaus.) The September 25, 2002 facsimile requested a response from Mr. Ekhaus by October 28, 2002.
- IV. On October 30, 2002, not having received any communication from Mr. Schumann or Mr. Ekhaus, the undersigned called Mr. Schumann by telephone to inquire as to Mr. Ekhaus' response to our request on September 25, 2002 for a properly executed Declaration. Mr. Schumann indicated that he had received our facsimile, Mr. Ekhaus had not changed his view since March 18, 2002, and that we should proceed with the petition under 37 CFR 1.47.

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**REASONS PROVIDED BY JOINT INVENTOR MR. EKHAUS' FOR REFUSING TO JOIN**

The undersigned incorporates by reference the reasons discussed in the March 18, 2002 petition by the undersigned. Since March 18, 2002, no additional reasons for refusing to join in the application have been provided by Mr. Ekhaus, or by Mr. Schumann on behalf of Mr. Ekhaus, to the undersigned.

**THE COMMISSIONER SHOULD ACCEPT THE ENCLOSED DECLARATIONS EXECUTED BY ROBERT DRISKILL AND FILIP MULIER AS PROPER AND ALLOW PROSECUTION TO BEGIN ON THE ABOVE IDENTIFIED APPLICATION**

A. The Declarations Signed by Robert Driskill and Filip Mulier May be Treated as Having Been Signed by All of the Joint Inventors on Behalf of the Non-signing Inventor

According to 37 C.F.R. 1.47(a), if a joint inventor refuses to join in an application for patent, an application may be made by an available inventor on behalf of himself or herself and the nonsigning inventor. According to M.P.E.P. § 409.03(a)(A), a declaration signed by all of the available joint inventors with the signature block of the nonsigning inventors left blank may be treated as having been signed by all of the available inventors on behalf of the nonsigning inventor.

Accompanying this Petition is a Declaration signed by available joint inventor Robert Driskill on December 23, 2001 (Exhibit C) and a Declaration signed by available joint inventor Filip Mulier on January 8, 2002 (Exhibit D). On both executed Declarations, the signature block for Michael A. Ekhaus, who refuses to join, has been left blank. Accordingly, Applicants submit that the requirements of M.P.E.P. § 409.03(a)(A) have been met.

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B. A Copy of the Application, as it was Filed On June 25, 2001, was sent to Joint Inventor Michael A. Ekhaus' Last Known Address on September 27, 2001

According to M.P.E.P. § 409.03(d), a copy of the application papers should be sent to the last known address of the nonsigning inventor. As indicated in the Statement of Facts associated with the March 18, 2002 petition, item II, the undersigned sent a copy of the application and figures to the last known address of nonsigning joint inventor Michael A. Ekhaus.

C. The Last Known Address for Michael A. Ekhaus

Pursuant to 37 C.F.R. § 1.47(a) and M.P.E.P. §§ 409.03(a)(C) and 409.03(e), the last known addresses for the nonsigning inventor is:

Mr. Michael A. Ekhaus  
315 Washington Avenue  
Hopkins, MN 55343

Furthermore, pursuant to M.P.E.P. § 409.03(e), the address for counsel to joint inventor

Mr. Ekhaus, and known to the undersigned is:

Mr. Michael A. Ekhaus  
c/o Glen E. Schumann, Esq.  
Moss & Barnett  
4800 Wells Fargo Center  
Minneapolis, MN 55402-4129

D. Discussion of the Statement of Facts and the Documentary Evidence as it Relates to Mr. Ekhaus' Refusal to Join in Accordance with M.P.E.P. § 409.03(d)

Refusal to join by joint inventor Mr. Ekhaus was made to the undersigned through Mr. Ekhaus' counsel, Mr. Schumann. Although Mr. Ekhaus was requested to provide a properly executed Declaration through his counsel, Mr. Schumann (the latest request occurring on

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September 25, 2002), Mr. Schumann on October 30, 2002, indicated by telephone that Mr. Ekhaus would not be submitting a properly executed Declaration for the reasons previously communicated to the undersigned in conjunction with the undersigned's March 18, 2002 petition under 37 CFR 1.47.

### **CONCLUSION**

The undersigned submits that all the requirements of 37 C.F.R. § 1.47(a) and M.P.E.P. §§ 409.03(a) (A)-(C), 409.03(d), and 409.03(e) have been met. In summary, in the present petition and in the March 18, 2002 petition submitted by the undersigned and incorporated by reference, the Applicants have submitted: (i) a statement of facts describing the presentation of the application papers and the subsequent refusal to join by joint inventor Michael A. Ekhaus correlated with documentary evidence to support the statement of facts; (ii) the reasons provided by joint inventor Michael A. Ekhaus for refusing to sign the declaration; (iii) Declarations signed by the available inventors; and (iv) the last known address for each nonsigning inventor. Furthermore, the Applicants have complied with the September 3, 2002 Decision and have responded within the two-month period for submission of a properly executed Declaration.

Accordingly, the undersigned requests that the Commissioner approve this petition and the enclosed Declarations executed by Robert Driskill and Filip Mulier, and allow prosecution on the merits to begin on the above-identified application.

Applicants provide authorization to charge the required petition fee of \$130.00, set forth under 37 C.F.R. § 1.17(h), to our deposit account 06-0916. If there are any other fees required for filing this response, including any fees for extensions of time required to enter this response,

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please charge these fees to our deposit account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.

By:   
James J. Boyle  
Reg. No. 46,570

Dated: November 4, 2002

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OFFICE OF PETITIONS

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